In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 474

IRWIN GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and a co-defendant were convicted in the United States District Court for the District of Connecticut on seven counts charging bankruptcy fraud in violation of 18 U.S.C. 152, and on an eighth count charging conspiracy, in violation of 18 U.S.C. 371. Petitioner was sentenced to imprisonment for three years on each of the eight counts, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner does not challenge the sufficiency of the evidence, which is related in some detail in the opinion of the court below. Prior to trial, he moved to

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consolidate certain counts of the indictment. The resolution of that motion was deferred to the trial of the cause, but was not then renewed. On appeal, petitioner contended that it was error to fail to consolidate Counts I, III, IV, VI, and VII. The court below suggested that there was "possible error" in failing to consolidate Counts I and IV, which separately charged fraudulent concealment of a bank account and a truck. But the court, even assuming error, could find not the "slightest prejudice", since the sentences on all eight counts are concurrent (Pet. App. A6–7). In addition, the court of appeals held that the failure to renew the consolidation motion at trial, as the pretrial motion judge advised, constituted a waiver of this objection (Pet. App. A7).

The structure of the indictment, which is all petitioner seeks to challenge, demonstrates that there is no occasion for further review. Counts I and IV charged violations of Section 152, paragraph 1, relating to the concealment of assets of the bankrupt's estate from the Trustee. Count I specifically charged the concealment of a truck and Count IV concealment of a bank account (Pet. App. C 13–14, 17).

Counts III and VI charged violations of Section 152, paragraph 6, relating to fraudulent transfer of assets in contemplation of bankruptcy. Count III concerned the transfer of the truck mentioned in Count I, and Count VI concerned the opening of the secret bank account mentioned in Count IV (Pet. App. C 15–16, 18–19).

Count VII, which constituted the principal accusation, charged a violation of paragraph 6 of Section 152 with respect to the transfer of property (other than the truck and the bank account) of a value between $25,000 and $95,000 in contemplation of bankruptcy (Pet. App. C 19–20).[1]

It is clear that Counts III, VI, and VII, alleging separate transfers of different property in contemplation of bankruptcy, charged separate offenses, *Dranow* v. *United States*, 307 F. 2d 545, 559 (C.A. 8). The transfer of property in contemplation of bankruptcy is a different offense from concealment of assets from the trustee or receiver, even if the same property is involved. Hence the offenses charged in Counts III, VI, and VII are different from those charged in Counts I and IV. See *United States* v. *Goodman*, 285 F. 2d 378, 379–380 (C.A. 5), certiorari denied, 366 U.S. 930. As to concealment of assets from the trustee charged in Counts I and IV, it has been held that the statute prohibits a course of conduct, irrespective of the actual number of separate concealments. See *Edwards* v. *United States*, 265 F. 2d 302 (C.A. 9) (involving various transfers of money into a bank account). In light of the concurrent sentences on all counts, even if we assume this doctrine applies to concealing different property in a single scheme, peti-

[1] Count II and Count V charged violations of paragraph 2 of Section 152 in that petitioner made false oaths by wilfully failing to list among the assets of the bankrupt the truck and bank account mentioned (Pet. App. C 14–15, 17–18). Count VIII charged conspiracy (Pet. App. C 20–22).

tioner was not prejudiced by the failure to consolidate Counts I and IV. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Lawn* v. *United States*, 355 U.S. 339, 359.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] In addition the court below correctly held that, by failing to renew at trial the motion to consolidate these counts, the petitioner waived any objection to their separate status.

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